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State Jurisdiction and On-Reservation Affairs: *Puyallup Tribe v. Dep't of Game*

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STATE JURISDICTION AND ON-RESERVATION AFFAIRS: *PUYALLUP TRIBE V. DEP'T OF GAME*

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I. INTRODUCTION

In recent years, the growing awareness by states of the need to enact wildlife conservation laws, and the more organized and vocal assertions by Native Americans of their tribal rights, have led to much controversy in the courts.[1] In June of 1977, while deciding the case of *Puyallup Tribe, Inc. v. Dep't of Game*[2] (*Puyallup III*) the United States Supreme Court was confronted with a conflict of ever increasing importance: the states' power to pass and enforce conservation laws, and the Indians' right to hunt and fish as guaranteed in treaties made over 100 years ago.

In *Puyallup III* the Supreme Court ignored the guaranteed rights of Indians to hunt and fish exclusively and without state interference on their reservation, and held that, while enforcing state conservation laws, the State of Washington could regulate *all* fishing of the Puyallup Indians. For the first time, no differentiation was made between regulation of on- and off-reservation fishing. In an ambiguous decision, the Court seemed to ignore traditional concepts of treaty interpretation and tribal sovereignty and held that conservation measures take precedence over treaty rights.

In light of the increased trend towards controlling Indian fishing off the reservations,[3] *Puyallup III* might be interpreted by states as a grant of permission to regulate Indian on-reservation fishing in the

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[1] AMERICAN FRIENDS SERVICE COMMITTEE, UNCOMMON CONTROVERSY, FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS 107-46 (1970) [hereinafter cited as UNCOMMON CONTROVERSY].

[2] ___ U.S. ___, 97 S.Ct. 2616 (1977).

[3] *See generally* Finnegan, *Indian Treaty Analysis and Off-Reservation Fishing Rights: A Case Study*, 51 WASH. L. REV. 61 (1975) [hereinafter cited as *Indian Treaty Analysis*].

name of conservation, despite the ambiguities of the Court's decision. Thus, *Puyallup III* raises serious questions as to the continuing validity of federal treaties made with the various Indian tribes.

In order to understand the *Puyallup III* decision, this article will begin with a discussion of the general concepts necessary for a basic understanding of Indian law. Attention will focus on several major areas: treaties, jurisdiction, reservations, and the traditional basis for the different treatment of Indians on and off their reservation. Then, the article will deal with the long history of the Puyallup controversy, a complex litigation spanning some 13 years and involving decisions in both state and federal courts, including three United States Supreme Court decisions. Alternative readings of *Puyallup III* will be discussed and analyzed, and the article will conclude with an evaluation of the case's potential impact on future reservation affairs.

II. General Concepts of Indian Law

"Indian law"[4] includes almost every field of law known in modern times. Since a complete study of the general concepts of Indian law would be beyond the scope of this article, this section will deal only with those concepts necessary for an understanding of the Puyallup litigation.

A. Indian Treaties

Until 1871, the treaty was the traditional means by which the United States government dealt with the Indian tribes.[5] In 1871, however, the power of Congress to make treaties with the Indians was terminated,[6] but Congress explicitly mandated that treaties

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[4] The federal law governing Indians is a mass of statutes, treaties, and judicial and administrative rulings, that includes practically all the fields of law known to textbook writers — the law of real property, contracts, corporations, torts, domestic relations, procedure, criminal law, federal jurisdiction, constitutional law, conflict of laws, and international law. And in each of these fields the fact that Indians are involved gives the basic doctrines and concepts of the field a new quirk which sometimes carries unpredictable consequences.

Margold, Introduction to F. Cohen, Federal Indian Law xxii (1942) [hereinafter cited as Cohen].

[5] In the Colonial period the European settlers realized that the Indians could outfight them. As a result, negotiated peace with the Indians was considered desirable, and treatymaking was the method employed to implement this goal. Treatymaking, as well as acquiring title to Indian land either by consent or purchase implied a recognition of the Indian groups as independent sovereign powers. *See* Comment, *The Indian Battle for Self-Determination*, 58 Calif. L. Rev. 445, 452 (1970).

[6] 25 U.S.C. § 71 (1970). Almost 1 billion acres in 400 treaties were acquired between 1778

made prior to that date were to continue in force until superceded by a congressional act.[7] Thus, as a noted scholar of Indian law stated, "one who attempts to survey the legal problems raised by Indian treaties must at the outset dispose of the objection that such treaties are somehow of inferior validity or are of purely antiquarian interest."[8]

Treaties with the Indians, according to the United States Constitution, are part of the supreme law of the land.[9] As a consequence, no state can enforce legislation which contradicts a treaty.[10] However, Congress itself has the power to enact legislation in conflict with Indian treaties, similar to its power in the field of foreign affairs.[11] Despite congressional authority to change unilaterally the terms of a treaty by enacting subsequent conflicting legislation, the courts have held that treaty rights cannot be abrogated by implication.[12] An intent to terminate such rights will not be imputed to Congress absent a clear statement or conclusive legislative history showing such an intent.[13]

Two basic rules of construction have evolved regarding Indian treaties: ambiguities are resolved in favor of the Indians,[14] and doubtful clauses are interpreted in light of the Indians' understanding of them at the time the treaties were signed.[15] These rules

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and 1871. Mickenberg, *Aboriginal Rights in Canada and the United States,* 9 OSGOODE HALL. L. REV. 119, 123 (1971) [hereinafter cited as *Aboriginal Rights*]. It has been stated that the abandonment of the treaty was a "recognition of the deterioration of tribal status from a position of substantial autonomy to one of nearly complete subservience." Oliver, *The Legal Status of American Indian Tribes,* 38 ORE. L. REV. 193, 200 (1959) [hereinafter cited as *Legal Status*].

[7] 25 U.S.C. § 71 (1970). "[B]ut no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be invalidated or impaired." *Id.*

[8] COHEN, *supra* note 4, at 33.

[9] U.S. CONST. art. VI, cl. 2. *See also* COHEN, *supra* note 4, at 34, and cases cited therein; Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

[10] As in all areas of law, with proper jurisdiction, federal law preempts state law under the Supremacy Clause of the Constitution. U.S. CONST. art. VI, cl. 2.

[11] Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66 (1903). *See also* COHEN, *supra* note 4, at 34.

[12] *E.g.,* United States v. Payne, 264 U.S. 446 (1924); United States v. Lee Yen Tai, 185 U.S. 213 (1902).

[13] Burnett, *Indian Hunting, Fishing and Trapping Rights: The Record and the Controversy,* 7 IDAHO L. REV. 49, 60 (1970) [hereinafter cited as *The Record and the Controversy*].

[14] Winters v. United States, 207 U.S. 564, 576 (1908); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551-53 (1832). *See also* COHEN, *supra* note 4, at 37.

[15] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551-53 (1832); Jones v. Meehan, 175 U.S. 1, 10-11 (1899). *See also* COHEN, *supra* note 4, at 37; *Indian Treaty Analysis, supra* note 3, at 66 n.30.

evolved from the proposition that all powers which are lawfully vested in an Indian tribe are *not* delegated powers granted by express act of Congress, "but rather inherent powers of a limited sovereignty which has never been extinguished."[16] The sole limitation on these rules of construction is that the courts will not ignore a condition or requirement of the treaty simply because of any notions of equity, general convenience or substantial justice.[17]

Treaty content varies from tribe to tribe.[18] Basically, however, treaties define the rights and reciprocal obligations of the Indians and the United States government.[19] Again, one must remember that these treaties were "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[20] Most treaties contain no express provisions on civil jurisdiction and therefore, "by implication, confirm the rule that tribal law governs the members of the tribe within the Indian country, to the exclusion of state law."[21] The few treaties which explicitly and emphatically assure that state laws will not be applied to the Indians are usually with tribes that had prior problems with state jurisdiction.[22]

Integral to many treaties is the agreement of the Indians to live exclusively on certain designated tracts of land known as reservations, and the ceding of the land on which the Indians had previously lived to the United States government. The Indians, while relinquishing the right to continue to live on such ceded land, usually retained the right to hunt, trap and fish at the places which they frequented prior to resettlement on the reservation.[23] Such fishing, taking place on lands ceded to the United States and outside the reservation boundaries, is called off-reservation fishing.

The Treaty of Medicine Creek, made with the Puyallup Tribe in

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[16] COHEN, *supra* note 4, at 122.

[17] United States v. Choctaw Nation, 179 U.S. 494 (1900); United States v. Minnesota, 270 U.S. 181 (1926). *See also* COHEN, *supra* note 4, at 37.

[18] COHEN, *supra* note 4, at 39. Among the most important subjects covered in treaties are: (1) the international status of the tribe, (2) the dependence of the tribe on the United States, (3) commercial relations of the tribe, (4) jurisdiction, and (5) control over tribal affairs. *Id.*

[19] COHEN, *supra* note 4, at 33.

[20] United States v. Winans, 198 U.S. 371, 381 (1905).

[21] COHEN, *supra* note 4, at 45.

[22] *Id.* at 45-46. An example of such a situation is the treaty of May 6, 1828 with the Cherokee Nation. This treaty guaranteed the Indians "a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State . . . ." Treaty with the Cherokees, May 6, 1828, United States:Cherokee Nation, 7 Stat. 311 (1828).

[23] *The Record and the Controversy, supra* note 13, at 69.

1854,[24] is exempletive of a treaty guaranteeing the Indians' right to fish off the reservation. Article III of the treaty states that "[t]he right of taking fish, *at all usual and accustomed grounds and stations,* is further secured to said Indians *in common with* all citizens of the Territory."[25]

The right to hunt and fish on the reservation free from state interference is generally considered to be implied in treaties which distinguish reservation tracts from ceded lands.[26] In *Menominee Tribe v. United States,*[27] the Supreme Court found that a grant of land "to be held as Indian lands are held"[28] included a reservation of the right to fish and hunt on those lands. The Court quoted from the Supreme Court of Wisconsin:

> It would seem unlikely that the Menominees would have knowingly relinquished their special fishing and hunting rights which they enjoyed on their own lands, and have accepted in exchange other lands with respect to which such rights did not extend. They undoubtedly believed that these rights were guaranteed to them when these other lands were ceded to them 'to be held as Indian lands are held.' Construing this ambiguous provision of the 1854 treaty favorably to the Menominees, we determine that they enjoyed the same exclusive hunting rights free from the restrictions of the state's game laws over the ceded lands, which comprised the Menominee Indian Reservation, as they had enjoyed over the lands ceded to the United States by the 1848 treaty.[29]

Likewise, Article II of the Treaty of Medicine Creek created the Puyallup Indian Reservation with broad language of preserved rights:

> There is . . . reserved for *the present use and occupation* of the said tribes and bands the following tracts of land . . . all of which tracts shall be set apart, and, so far as necessary, surveyed and marked out *for their exclusive use*; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent.[30]

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[24] Treaty of Medicine Creek, Dec. 26, 1854, United States: Nisquallys & c., 10 Stat. 1132 (1854). In this treaty the Indians ceded 2,240,000 acres for a price of $32,500 to be paid over a 20 year period. UNCOMMON CONTROVERSY, *supra* note 1, at 25.

[25] Treaty of Medicine Creek, Dec. 26, 1854, United States:Nisquallys & c., 10 Stat. 1132, 1133 (1854) (emphasis added).

[26] UNCOMMON CONTROVERSY, *supra* note 1, at 84. *See also* Hobbs, *Indian Hunting and Fishing Rights,* 32 GEO. WASH. L. REV. 504, 511 (1964).

[27] 391 U.S. 404 (1968).

[28] *Id.* at 406.

[29] *Id.* at 406 n.2.

[30] Treaty of Medicine Creek, Dec. 26, 1854, United States: Nisquallys & c., 10 Stat. 1132, 1133 (1854) (emphasis added). At the time the Treaty of Medicine Creek was signed the

Although not explicitly mentioned, using common rules of construction such as interpreting the treaties as the Indians would have understood them and resolving ambiguities in favor of the Indians, hunting and fishing rights should be implied.

B. Jurisdiction

A great deal of dispute exists as to who has jurisdiction over Indian affairs, the Indians, the federal government, or the states. In the words of one authority, "[t]he Indians' right of self-government is a right which has been consistently protected by the courts, frequently recognized and intermittently ignored by treaty-makers and legislators, and very widely disregarded by administrative officials."[31] The basis for this right of self-government stems from the fact that at the time of treaty making, the Indians were considered sovereign nations relinquishing substantial rights.[32]

Throughout the years the federal government acquired increasing control over Indian affairs.[33] Various sources have been relied upon to prove that the federal government has jurisdiction over Indian activities. First, and most commonly cited, is the United States Constitution which grants Congress the authority to control commerce with the Indian tribes,[34] to make expenditures for the public welfare,[35] to regulate the property of the United States,[36] and to make treaties with the Indians.[37] A second source of federal power is based on a court-created guardian/ward theory which views the Indians as people in need of governmental protection.[38] Finally, the

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Puyallups were actively involved in fishing. They used the fish for trade, food and a medium for exchange. United States v. Washington, 384 F. Supp. 312, 370 (W.D. Wash. 1974). Thus, at the time the treaty was signed fishing rights were undoubtedly considered when the reservation was set apart for the Indians' "use and occupation."

[31] COHEN, *supra* note 4, at 122.

[32] See text at note 16, *supra*.

[33] The trend toward federal intervention in on-reservation Indian affairs began in the middle of the nineteenth century, with the country's response to the Supreme Court decision in Ex parte Crow Dog, 109 U.S. 556 (1883). In *Crow Dog*, the Court held that a federal district court lacked jurisdiction to try a Buile Sioux for the on-reservation murder of another Buile because federal law did not apply to on-reservation crimes between Indians. The American public was horrified that the accused murderer was beyond the reach of its courts. Congress reacted to the furor by passing the Major Crimes Act of 1885, 18 U.S.C. § 1153 (1970), which gave federal courts criminal jurisdiction over certain crimes committed by Indians. *See* Comment, *The Indian Battle for Self-Determination*, 58 CALIF. L. REV. 445, 456-57 (1970).

[34] U.S. CONST. art. I, § 8, cl. 3.

[35] U.S. CONST. art. I, § 8, cl. 1.

[36] U.S. CONST. art. IV, § 3, cl. 2.

[37] U.S. CONST. art. II, § 2, cl. 2.

[38] COHEN, *supra* note 4, at 90. For a detailed discussion of the growth of the wardship

treaties themselves have been cited as showing that the Indians granted the federal government control over their affairs.[39] Specific treaty provisions, which often control jurisdictional determinations, add even more confusion to the dispute over who has jurisdiction over Indian affairs.

Numerous authors have criticized the extensive power of the federal government in Indian affairs, claiming that federal regulation should be limited to situations expressly delegated to Congress in the Constitution, such as interstate commerce.[40] However, the existence of extensive federal involvement in Indian affairs can no longer be denied:

> One authority has argued persuasively that this federal power (over the Indians) is founded upon treaties; but whether it be treaties, the commerce clause, wardship, or mere coercion, the fact is that the government *has* the power, and it is now far too late in the day to question its legitimacy.[41]

States, too, have claimed jurisdiction to regulate Indian affairs. The basis for their claim is the constitutional doctrine that states possess original and complete sovereignty over their own territory except as such sovereignty is limited by the United States Constitution.[42] State jurisdiction over Indian affairs has been severely limited by several factors, however. First, much of the area has been explicitly preempted by the federal government.[43] An additional curtailment of state power has been in the treaties themselves,[44] treaties are the supreme law of the land,[45] and they "quite generally promised the tribes, either expressly or by implication, that they would not be subject to the sovereignty of the individual states, but would be subject only to the Federal Government."[46] Finally, the intermittently recognized right of tribal sovereignty has served as a

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doctrine *see Indian Treaty Analysis, supra* note 3, at 68-85.

[39] *Legal Status, supra* note 6, at 203.

[40] *See, e.g.*, COHEN, *supra* note 4, at 90.

[41] *Legal Status, supra* note 6, at 203.

[42] Ward v. Racehorse, 163 U.S. 504 (1896); COHEN, *supra* note 4, at 117. *See also Indian Treaty Analysis, supra* note 3, at 67.

[43] *See Legal Status, supra* note 6, at 211-12. For example, Congress has stated that it alone can authorize the sale of reservation lands, and, as a consequence, neither the Indians nor the states can approve the alienation of reservation lands without congressional consent. Federal law has preempted the field. COHEN, *supra* note 4, at 320-24.

[44] See text at note 21, *supra*.

[45] See text at note 9, *supra*.

[46] COHEN, *supra* note 4, at 117.

limitation on state jurisdiction.[47]

As a consequence of federal preemption, tribal self-government, and treaty provisions, states have no inherent on-reservation jurisdiction. In *McClanahan v. Arizona State Tax Commission,*[48] a case concerned with the question of whether a state may tax a reservation Indian for income earned exclusively on the reservation, the Supreme Court stated:

> The principles governing the resolution of this question are not new. On the contrary, '(t)he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.' This policy was first articulated by this Court 141 years ago when Mr. Chief Justice Marshall held that Indian nations were 'distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within these boundaries, which is not only acknowledged, but guarantied by the United States.' It followed from this concept of Indian reservations as separate, although dependent nations, that state law could have no role to play within the reservation.[49]

As a general rule, Indians who are off the reservation are subject, to the same extent as aliens or non-Indian citizens, to the laws of the state.[50] Once off the reservation, Indians are no longer considered members of a distinct political community, and the interest of the state becomes predominate.[51]

Despite the fact that the Indian right to fish both on and off the reservation is guaranteed by their treaties the courts have followed

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[47] *See, e.g.,* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). In this case the State of Georgia, in an attempt to destroy the tribal government of the Cherokees, imprisoned a white man living among the Cherokees with consent of tribal authorities for residing among the Cherokees without a license. The arrest was found unconstitutional. *Id.* at 561-62.

[48] 411 U.S. 164 (1973).

[49] *Id.* at 168. The courts have on occasion extended the wardship doctrine to allow state jurisdiction over some on-reservation activities. In Williams v. Lee, 358 U.S. 217 (1959), a case concerned with a non-Indian who brought suit against reservation Indians to collect for goods sold on the reservation for credit, the Court created the infringement test. The test states that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220. This infringement test has never been used in cases concerning on-reservation fishing rights. This test was raised, however, as a possible standard of review by the Indians in *Puyallup III,* but was ignored by all courts in the Puyallup litigation. Brief for Petitioners, at 20-27, Puyallup Tribe, Inc. v. Dep't of Game, ___ U.S. ___, 97 S.Ct. 2616 (1977).

[50] COHEN, *supra* note 4, at 119.

[51] *See, e.g.,* In Re Wolf, 27 F. 606, 610 (D.C. Ark. 1886). *See also* COHEN, *supra* note 4, at 119, and cases cited therein.

a pattern analogous to the previously defined on-and off-reservation dichotomy. Until *Puyallup III*[52] it was well established that the states were without jurisdiction over Indians fishing on their reservation.[53] Off-reservation fishing, however, has been subject to state regulation despite a great deal of criticism to the contrary.[54]

Despite the fact that states lack inherent jurisdiction over on-reservation affairs, Congress has the power to delegate such authority to the states and has done so in many cases.[55] For example, Congress has granted several states the right to assume civil and criminal jurisdiction over Indian activities on the reservation.[56] The State of Washington acquired civil and criminal jurisdiction within the Puyallup Reservation in 1957, pursuant to Public Law 280:[57]

> The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State

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[52] Puyallup Tribe Inc. v. Dep't of Game,___U.S.___, 97 S. Ct. 2616 (1977).

[53] Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971); Arnett v. Five Gill Nets, 48 Cal. App. 3d 454 (1975), *cert. denied*, 425 U.S. 907 (1976); People v. Jondreau, 384 Mich. 539, 185 N.W. 2d 375 (1971). Writers on the subject of Indian fishing rights have stated definitively that on-reservation fishing is not subject to state control. *See, e.g., Indian Treaty Analysis, supra* note 3, at 72-73. A major reason for the difference in treatment between on- and off-reservation fishing cases, where both the right to fish on and off the reservation is preserved in the treaties, is the particular wording of such treaties. The off-reservation right to fish is usually "in common with" others, while the on-reservation right is exclusive.

[54] *See Indian Treaty Analysis, supra* note 3; Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207 (1972) [hereinafter cited as *A Supreme Court Error*].

[55] *See, e.g.*, Pub. L. No. 280, 67 Stat. 588 (1953) (*codified at* 18 U.S.C. § 1162(a) (1970)). This section gives the states of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin jurisdiction over offenses by or against Indians in certain areas of Indian country located within the states.

[56] *Id.*

[57] Pub. L. No. 280 § 7, 67 Stat. 590 (1953) (*repealed by* Pub. L. No. 90-284, 82 Stat. 79 (1968)). The State of Washington passed legislation in 1957, chapter 37.12 of the Revised Code of Washington, to take advantage of Public Law 280. This chapter provided that the state could assume jurisdiction on a reservation at the request of the tribe. The Puyallups never requested such jurisdiction, but it had been imposed years before. *See* UNCOMMON CONTROVERSY, *supra* note 1, at 51-52. The Washington law also states:

> Nothing in this chapter shall . . . authorize regulation of the use of such property in a manner inconsistent with any federal treaty, [or] agreement . . . or shall deprive any Indian or any Indian tribe, band or community of any right, privilege, or immunity afforded under Federal treaty, agreement, statute, or executive order with respect to Indian land grants, hunting, trapping, or fishing or the control, licensing or regulation thereof.

WASH. REV. CODE § 37.12.060 (1964).

> shall, by affirmative legislative action, obligate and bind the State to assumption thereof.[58]

This jurisdiction, however, does not extend to any "right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping or fishing or the control, licensing, or regulation thereof."[59]

The Supreme Court discussed this statute in the case of *Menominee Tribe v. United States*.[60] In that case, the Menominee Tribe was requesting compensation for the loss of their hunting and fishing rights which the Wisconsin Supreme Court[61] had held abrogated by the Menominee Termination Act of 1954.[62] The Termination Act provided for the termination of federal supervision over the property and members of the tribe, whereupon state laws were to become applicable to the Menominees in the same manner as applied to others. The Supreme Court interpreted Public Law 280 as protecting the hunting, trapping, and fishing rights guaranteed by any federal treaty, and concluded that a reading of the Termination Act and Public Law 280 together led to the conclusion that "although federal supervision of the tribe was to cease and all tribal property was to be transferred to new hands, the hunting and fishing rights granted or preserved by the Wolf River Treaty of 1854 survived the Termination Act of 1954."[63] While the Court did not explain whether the exclusivity of hunting and fishing rights terminated with the reservation, it did affirm the existence of these rights.[64] The clear implication of the Court's holding is that Public Law 280 does not extend state jurisdiction over fishing rights guaranteed by federal treaty.[65]

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[58] Pub. L. No. 280, 67 Stat. 590 (1953) (*repealed by* Pub. L. No. 90-284, 82 Stat. 79 (1968)). The repeal of the quoted section of Pub. L. No. 280 did not affect Washington's assumption of jurisdiction, as it was assumed prior to repeal. This section was the only section repealed. As Pub. L. No. 90-284 says "such repeal shall not affect any cessation of jurisdiction made pursuant to such section prior to its repeal." Pub. L. No. 90-284, 82 Stat. 79 (1968).

[59] 18 U.S.C. § 1162(b)(1970).

[60] 391 U.S. 404 (1968).

[61] State v. Sanapaw, 21 Wisc. 2d 377, 124 N.W. 2d 41 (1963).

[62] 68 Stat. 250 (1954), *as amended*, 25 U.S.C. §§ 891-902 (1970). The Treaty of Wolf River, May 12, 1854, United States: Menominees, 10 Stat. 1064 (1854), guaranteed the rights in question.

[63] 391 U.S. 404, 411 (1968).

[64] *Id.* at 406-07.

[65] The Menominee case does not stand for the proposition that all rights reserved on a reservation are exclusive, because the Court refused to deal with this issue. The Court did say, however, that hunting and fishing rights exist on a reservation even though such rights are not explicitly reserved, and that the granting of state jurisdiction over Indian affairs in

In sum, states have no *inherent* jurisdiction over the activities of Indians within their reservation boundaries. Nevertheless, Congress has granted the State of Washington, among others, on-reservation civil and criminal jurisdiction. Such jurisdiction, according to the Court, does not extend to treaty-guaranteed hunting and fishing rights.

C. *Indian Reservations*

The status of an Indian reservation is a concept necessary to an understanding of the Puyallup litigation. A confusing characteristic of reservations is that all the land within the reservation boundaries does not have to belong to the Indians themselves. In *Mattz v. Arnett,*[66] the Supreme Court found that the sale of land within reservation boundaries was not sufficient to terminate a reservation's status. Quoting from an earlier decision,[67] the Court noted that " '[w]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.' A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and by legislative history."[68]

In *Mattz,* the Court also cited the congressional definition of "Indian Country" to support the contention that the sale of land within reservation boundaries does not necessitate the extinction of the reservation.[69] Indian Country is defined as "*all land* within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation."[70] In an earlier case,[71] the Court explained the situation which prompted this definition:

> [w]here the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in

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Public Law 280 did not destroy those rights. Other cases and authorities which have dealt with the extent of such implied on-reservation hunting and fishing rights have found them to be exclusive. See note 53 and accompanying text, *supra.*

[66] 412 U.S. 481 (1973).

[67] United States v. Celestine, 215 U.S. 278 (1909).

[68] Mattz v. Arnett, 412 U.S. 481, 504-05 (1973).

[69] *Id.* at 504.

[70] 18 U.S.C. § 1151 (1970) (emphasis added).

[71] Seymour v. Superintendent, 368 U.S. 351 (1962).

order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government.[72]

The dispute in *Puyallup III* centered on the issue of what treaty rights were retained by an Indian tribe in land within the reservation which had been sold. Before examining the Supreme Court's solution to this problem, it is useful to review the long history of the Puyallup litigation.

III. History of the Puyallup Litigation

The Puyallup Indians were parties to the Treaty of Medicine Creek.[73] This treaty was negotiated by Washington's Governor Stevens in 1854 for the purpose of extinguishing Indian claims to the land in Washington Territory, and to provide for the peaceful and compatible coexistence of Indians and non-Indians in the area.[74] As noted previously, Article II of the treaty created the Puyallup Reservation for the Indians' "exclusive use."[75] In addition to the exclusive rights of the Indians on the reservation, Article III of the treaty guaranteed the Indians' right to fish "in common with" the settlers of the Territory off the reservation at the locations where they had usually fished.[76]

The Puyallup Reservation, as created by the Medicine Creek treaty, originally contained approximately 1,200 acres, but was later expanded to include over 23,000 acres.[77] Presently, however, the Puyallups are greatly assimilated into the non-Indian society of the

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[72] *Id.* at 358.

[73] Treaty of Medicine Creek, Dec. 26, 1854, United States: Nisquallys, & c., 10 Stat. 1132 (1854).

[74] United States v. Washington, 384 F. Supp. 312, 355 (W.D. Wash. 1974). Treaties with 6,000 Puget Sound Indians were made in a period of a few months, including treaties signed at Medicine Creek, Point Elliot, Point No Point, Neah Bay, and Quinalt River. The treaties, although written in English, were negotiated in the Chinook jargon, a jargon of only some 300 words garnered from several Indian languages and from English and French.

A few months before he took action, Governor Stevens outlined the goals he sought in treaties. Their basic purpose was to allow the Indians enough land and farm instruments so that a homestead farming pattern would encourage the Indians to disappear into the American melting pot within one generation. Governor Stevens seemed to have been impressed with the importance of the fish to the Indians. He understood that one indispensable requirement for securing any agreement with the Indians of the Pacific Northwest was to assure them of their continued right to fish. Uncommon Controversy, *supra* note 1, at 18-25.

[75] See text at note 30, *supra*.

[76] See text at note 25, *supra*.

[77] Uncommon Controversy, *supra* note 1, at 53.

State of Washington.[78] The Puyallups have sold most of their land and now hold title to only 22 acres of land which are being used as a tribal cemetery. Indeed, the lands within the reservation boundaries now comprise an integral part of the City of Tacoma.[79]

A. Puyallup I

The Puyallup litigation began in 1963 in the Superior Court of the State of Washington.[80] The Department of Game and the Department of Fisheries of Washington brought an action against the Puyallup Tribe and various individual tribal members to determine what rights, privileges, or immunities individual tribal members had with reference to the state's laws regulating fishing in the Puyallup River and adjacent waters. The Department of Game regulates steelhead trout fishing in the waters in question, since steelhead are considered a game fish, while the Department of Fisheries regulates the food fish, salmon. According to regulations promulgated by these departments, steelhead may be taken only by hook and not commercially,[81] and salmon may be taken commercially with nets of a certain type in certain areas.[82] Set nets or fixed appliances are barred in "any waters" of the state for the taking of salmon or steelhead.[83] Nonetheless, the Puyallup Indians used set nets to fish in Commencement Bay, at the mouth of the Puyallup River, and in areas upstream. They fished commercially as well as for their own needs and all parties agreed that the nets used were illegal if the regulations of the State of Washington were applicable to the Puyallups.[84]

The trial court determined that neither the Puyallup Tribe nor the Puyallup Reservation still existed. Consequently, the Puyallups could claim no treaty rights and were subject to the state's laws. An injunction to prevent net fishing by the Indians was granted.[85]

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[78] Dep't of Game v. Puyallup Tribe, Inc., 70 Wash. 2d 245, 253, 422 P.2d 754, 759 (1967).

[79] *Id.* at 251, 422 P.2d at 758.

[80] The decision of the State Superior Court is unreported.

[81] Wash. Dep't of Game Perm. Reg. No. 34 (1964).

[82] WASH. REV. CODE §§ 75.12.140, 75.12.010 (1962).

[83] WASH. REV. CODE § 75.12.060 (1962); WASH. REV. CODE § 77.16.060 (1962).

[84] Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 396 (1968). The fish in dispute in the Puyallup litigation were four types of salmon and steelhead trout. They are all anadromous fish that hatch in the fresh water of the Puyallup and Nisqually Rivers. The fish come into the ocean, pass through the salt water of Puget Sound, enter the fresh waters at the mouths of rivers and go up river to spawn. The adult salmon die after spawning, but the adult steelhead may live on for some time. *Id.* at 395. For a detailed discussion of the fishing situation see UNCOMMON CONTROVERSY, *supra* note 1, at 147-85.

[85] Dep't of Game v. Puyallup Tribe, Inc., 70 Wash. 2d 245, 248, 422 P.2d 754, 756 (1967).

On appeal, the Washington Supreme Court[86] held that the trial court lacked jurisdiction to determine the existence of the Puyallup Tribe since Congress still recognized the tribe. The court agreed, however, that the reservation had been extinguished and held that no fishing rights derived from any rights in the reservation lands could be claimed.[87] The basis for the court's determination that the reservation no longer existed was the lower court's finding of significant acreage depletion:

> All the lands within the exterior boundaries of the old Puyallup Indian Reservation were sold, in fee simple absolute, pursuant to an act of Congress (33 Stat. 565) with the exception of two small tracts which are presently being utilized as a cemetery for members of the federal organization known as the 'Puyallup Tribe.' The total acreage remaining in trust status is approximately 22 acres. The original reservation was in excess of 18,000 acres.[88]

The Washington Supreme Court held that once the Indians had terminated their reservation by alienating their land in fee simple absolute, they could not claim that there was an implied reservation of exclusive hunting and fishing rights.[89] Consequently, exclusive rights, as expressly guaranteed by Article II of the Treaty of Medicine Creek, could not be asserted. However, as the *Mattz* case held, the alienation of reservation land can be "completely consistent

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[86] Dep't of Game v. Puyallup Tribe, Inc., 70 Wash. 2d 245, 422 P.2d 754 (1967).

[87] Article II of the Treaty of Medicine Creek established a reservation for the Puyallups' exclusive use. Using traditional concepts of treaty interpretation, exclusive fishing should be among those rights reserved by Article II. See text at notes 26-30, *supra*.

[88] Dep't of Game v. Puyallup Tribe, Inc., 70 Wash. 2d 245, 253, 422 P.2d 754, 759 (1967). Article VI of the Treaty of Medicine Creek gave the President the authority to remove the Indians to another place upon paying the Indians for improvements and the expenses of their removal. It also allowed him to divide the reservation into lots and assign such lots to individual Indians or families. Such a division was authorized by the General Allotment Act of 1887. 24 Stat. 388 (1887). In 1893, Congress enacted the Puyallup Allotment Act, 27 Stat. 612, 633 (1893). This Act provided for a three-member commission, appointed by the President, to select and appraise property within the Puyallup Reservation. It further provided for the sale of lands within the reservation with the approval of the Secretary of the Interior. However, the Act specifically provided that the Indians would not have the power of alienation of the allotted lands for a period of ten years, 27 Stat. 633 (1893). On April 28, 1904, an Act confirming the removal of restrictions upon alienation by the Puyallup Indians of their allotted land was passed, Pub. L. No. 248, 33 Stat. 565 (1904). The trial court in *Puyallup I* "found that all lands within the boundaries of the reservation created by the Treaty have been transferred to private ownership pursuant to these Acts of Congress, with the exception of two small tracts used as a cemetery for members of the tribe, and much of it is now in the City of Tacoma." Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 394 (1968).

[89] Dep't of Game v. Puyallup Tribe, Inc., 70 Wash. 2d 245, 254, 422 P.2d 754, 759-60 (1967).

with continued reservation status."[90] The issue which then becomes relevant is whether the exclusive hunting and fishing rights still exist if the reservation still exists but much of the land on the reservation has been alienated. This question, which forms the basis for the *Puyallup III* litigation, was never considered by the Washington Supreme Court in *Puyallup I* since the court found that the reservation had been extinguished.

All treaty provisions not dependent upon the existence of a reservation were still valid, however, because the Puyallup Tribe still existed.[91] Article III of the Treaty of Medicine Creek, which gave the Puyallups the "right of taking fish at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory" was still applicable. This right to take fish "in common with" the others was interpreted by the court to mean that although the Indians did have the right to fish, such off-reservation fishing could be regulated by the state. This interpretation mandated that *all* fishing be considered "off-reservation" since it was determined that the reservation no longer existed. The court ruled that any regulation had to be "reasonable and necessary" for the preservation of fisheries. Since the trial court's injunction was found to be too broad, the case was remanded.

The Puyallup Indians appealed the case to the United States Supreme Court.[92] A major issue throughout the litigation was whether or not the state courts had jurisdiction to entertain the action. The Puyallups claimed tribal immunity from any action in state court without tribal consent or the consent of the United States government.[93] The Supreme Court, however, denied the Indians' claim:

> This case . . . is a suit to enjoin violations of state law by individual tribal members fishing off the reservation. As such, it is analagous to prosecution of individual Indians for crimes committed off reservation

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[90] Puyallup Tribe, Inc. v. Dep't of Game, ___ U.S. ___, 97 S.Ct. 2616, 2626 (1977) (Brennan, J., dissenting).

[91] Dep't of Game v. Puyallup Tribe, Inc., 70 Wash. 2d 245, 261, 422 P.2d 754, 763 (1967).

[92] Puyallup Tribe v. Dep't of Game, 391 U.S. 392 (1968).

[93] It is well established that a tribe has immunity from suit in the state courts absent its consent or the consent of the federal government. *See* United States v. United States Fidelity and Guaranty Co., 309 U.S. 506 (1940). The Puyallups claimed that fishing rights were tribal property, and consequently this was a suit against the tribe. Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 396-97, n. 11 (1968). However, the Puyallups' argument was rejected by the Court. *Contra,* Whitefoot v. United States, 293 F.2d 658 (Ct. Cl. 1961) (Indian fishing rights held to be tribal property).

> lands, a matter for which there has been no grant of exclusive jurisdiction to federal courts.[94]

While apparently basing its jurisdictional decision on a finding that the fishing in question was off the reservation, the Court refused to determine whether or not a reservation still existed. In a footnote the court stated:

> Whether in light of this history the reservation has been extinguished is a question we do not reach. The Washington Supreme Court seems to hold that the right to fish in streams once within the old reservation is protected by the Article III guarantee. There are indeed no other fishing rights specifically reserved in the Treaty of Medicine Creek except those covered by Article III.[95]

It remains unclear whether the Court was really agreeing that the reservation had been terminated, since this was a basis for the state court's finding that Article III was controlling, or whether the Court was saying that the conveyance of the land included the conveyance of the exclusive fishing rights on those lands, thereby leaving only the right to fish in common with the citizens of the Territory regardless of the reservation status. If the latter interpretation is correct, it is even more unclear how the Court substantiated its jurisdictional finding that the suit was analagous to the prosecution of individuals for crimes committed off the reservation,[96] when it was in fact saying that the fishing may be taking place on the reservation. Alternatively, the Court may have found that the exclusive right to the land, as guaranteed in Article II of the Treaty, did not include fishing rights. This interpretation of the holding, however, would fail as contradictory to the general concept of Indian law that exclusive fishing rights are implied on a reservation.[97] The refusal

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[94] Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 396-97 n.11 (1968).

[95] *Id.* at 394-95 n.1.

[96] See text at notes 42-65, *supra*, for discussion of state jurisdiction on and off a reservation. The Court itself in *Puyallup I* noted that certain aspects of criminal prosecution have been granted exclusively to federal courts for on-reservation acts. The Court cited 18 U.S.C. § 1153 (1970) (listing specific crimes committed by Indians within Indian country and placing them within the exclusive jurisdiction of the United States) and 18 U.S.C. § 1162 (1970) (giving states jurisdiction over on-reservation offenses, but excluding hunting and fishing rights from such jurisdiction). See text at notes 55-65, *supra*. The Court also cited Seymour v. Superintendent, 368 U.S. 351 (1962), and U.S. v. Celestine, 215 U.S. 278 (1909) (criminal acts performed by Indians within Indian country found to be under the exclusive jurisdiction of the federal courts). Thus, the Court in *Puyallup I* implied that were the fishing done on a reservation, the state would have no jurisdiction. Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 396 n.11 (1968).

[97] See text at notes 23-30, *supra*.

of the Supreme Court to determine whether or not the reservation still existed was the major basis for confusion throughout the Puyallup litigation.[98]

In affirming the state court's interpretation of Article III, the Supreme Court held that although the state could not qualify the Indians' treaty *right* to fish "at all usual and accustomed places," the state could regulate the *manner* of fishing in the interest of conservation, provided the regulations meet appropriate standards and do not discriminate against the Indians.[99] The case was remanded to determine if the state's prohibition against the use of set nets was "reasonable and necessary"[100] for the purpose of conservation, with the proviso that "any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with'."[101]

Following the Supreme Court's decision in *Puyallup I,* the Department of Fisheries promulgated regulations limiting commercial net fishing for salmon but permitting Indian net fishing for salmon in the Puyallup River. The Department of Game, however, continued its total prohibition on net fishing for steelhead trout.[102] These new regulations were considered in light of the remand from the Supreme Court.

B. Puyallup II

The Superior Court of the State of Washington upheld the Department of Fisheries' regulations which permitted Indian net fishing for salmon in the Puyallup River.[103] The court found, however, that the Department of Game had not met its burden of proving that the total ban on net fishing for steelhead trout was "reasonable and necessary" for the conservation of the fishery. Consequently, the prior injunction of net fishing for trout was dissolved. The Washington Supreme Court[104] affirmed the lower court's decision, but

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[98] See text at notes 133-63, *infra.*

[99] Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 398 (1968).

[100] *Id.* at 401 n.14.

[101] *Id.* at 403.

[102] It has been suggested that since the Department of Game receives no funds from the general tax revenues of the state, and because its funds come principally from sport fishing license fees and other license fees and tags which the Indians are not required to buy, sport fishermen feel that the game fish, especially the steelhead, belong to them. UNCOMMON CONTROVERSY, *supra* note 1, at 63.

[103] The decision of the State Superior Court is not reported.

[104] Dep't of Game v. Puyallup Tribe, Inc., 80 Wash. 2d 561, 497 P.2d 171 (1972).

found that the ban on trout fishing was valid for the year 1970. The court held, however, that a permanent total injunction against trout net fishing was automatically invalid in light of the *Puyallup I* rule that the Indians' *right* to take fish could not be abrogated.[105] Consequently, the court ordered the Department of Game to remove the injunction when it was no longer necessary for the conservation of fish. The Department was also ordered to demonstrate annually the necessity of conservation regulations affecting the Puyallup Indian fishery.

The Department of Game's regulations were the only regulations in question when the United States Supreme Court decided *Puyallup II.*[106] The Supreme Court reasserted the proposition that off-reservation fishing rights of the Indians were subject to certain state regulations, but that those regulations must be reasonable and necessary, and not discriminatory against the Indians. The Court found the Department of Game's ban on trout net fishing to be discriminatory since hook and line trout fishing, which the Court found to be entirely preempted by non-Indians, was allowed.[107] The case was remanded so that non-discriminatory regulations could be created. Since the only decision which had been made regarding the status of the Puyallup Reservation to date was that it no longer existed, *Puyallup II* involved only off-reservation fishing: on-reservation fishing rights were not in issue.

C. Federal Court Cases

Following the decision in *Puyallup II,* and prior to the state courts' decision on remand, two cases involving the Puyallup Indians were decided in the lower federal courts. In the first case,[108] the court had to decide whether the Puyallup Reservation still existed, and, consequently, whether the state could regulate fishing within the reservation. Parties to this suit were the United States and the State of Washington. The District Court for the Western District of Washington determined that certain Indian reservations, including

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[105] *Id.* at 571, 497 P.2d at 178.

[106] Dep't of Game v. Puyallup Tribe, 414 U.S. 44 (1973).

[107] *Id.* at 48.

[108] United States v. Washington, No. 39-71C3 (W.D. Wash., Jan. 29, 1973). This case was brought in federal court for two major reasons. First, the court determined that the existence of a reservation was a federal question. Second, it was found that the existence of the Puyallup Reservation had been left open by the Supreme Court in *Puyallup I.* United States v. Washington, 496 F.2d 620, 620 (9th Cir. 1974).

the Puyallup's, no longer existed and, consequently, that the Indians could not fish free from state interference.[109] The United States appealed the decision.

The Court of Appeals reversed[110] and found that the Puyallup Reservation was still in existence. In a short decision, the court found that the legislative history in the case of the Puyallups did not show an intent of Congress to abolish the reservation. Consequently, the court concluded that the Puyallup Tribe could fish free from state interference in the portion of the Puyallup River lying within the reservation boundaries. The Supreme Court refused to hear the case.[111]

The second suit in federal court[112] was brought by the United States to require the State of Washington to observe fishing rights guaranteed to numerous tribes, including the Puyallups. Specific findings of fact relating to the Puyallups were made. Although the case was basically concerned with off-reservation fishing, since the final decision regarding the Puyallup Reservation was still pending on appeal, the court held that on-reservation fishing was not subject to state regulation.[113] The court found that the state could regulate off-reservation fishing only if it satisfied the court that the regula-

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[109] *Id.*

[110] United States v. Washington, 496 F.2d 620 (9th Cir. 1974), *cert. denied*, 419 U.S. 1032 (1974). The decision of the Court of Appeals that the Puyallup Reservation still existed had no effect on the state courts. The state courts relied on the fact that the United States Supreme Court had remanded that case to them as a basis for their continuing jurisdiction on the reservation. The issues of *res judicata* and collateral estoppel were never discussed by the state courts or in the majority decision of the Supreme Court.

[111] United States v. Washington, *cert. denied*, 419 U.S. 1032 (1974).

[112] United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). For a detailed analysis of the case and its implications *see Indian Treaty Analysis, supra* note 3.

[113] *See* Puyallup Tribe, Inc. v. Dep't of Game, ___ U.S. ___, 97 S.Ct. 2616, 2627 n.5 (1977) (Brennan, J., dissenting). The exact sequence of the federal court cases is confusing but important to understand. First it was decided in an unreported decision that the Puyallup Reservation had been extinguished. Then, in another suit, United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), the fishing of numerous tribes of the Pacific Northwest, including the Puyallups, was discussed. In this case it was held that on-reservation fishing could not be regulated and that the tribes were entitled to the opportunity to catch 50% of the run off the reservation. Although no determination was made concerning the on-reservation fishing of the Puyallups since it had been determined that the reservation had terminated, there was no evidence that the Puyallups would be treated any differently than any other tribe where on-reservation regulation was forbidden. After this decision, the first federal district court case was heard on appeal, and it was found that the Puyallup Reservation still existed. United States v. Washington, 496 F.2d 620 (9th Cir. 1974). Then the second case involving the numerous tribes was affirmed. United States v. Washington, 520 F.2d 676 (9th Cir. 1975).

tion was "reasonable and necessary" for conservation. It also concluded that certain tribes could regulate fishing by their own members free from state interference providing that they fulfill certain conditions designed to keep the state informed of their regulations and fishing activities. The court then decreed that the Puyallups were entitled to the opportunity to catch 50% of the harvestable steelhead off the reservation.[114] Fishing of the Puyallups remained under the jurisdiction of the court pursuant to an order of the court. Such continuing jurisdiction was necessary to prevent non-Indians from interfering with the Indians' right to catch 50% of the run outside reservation boundaries, and to make certain that state regulation of Indian fishing took place only when it was "necessary" for conservation purposes.

D. Puyallup III

Following these federal decisions regarding the status of the Puyallup Reservation and the on-reservation fishing rights of the Indians, the Washington State courts decided the *Puyallup II* issues on remand from the United States Supreme Court. The state superior court, while accepting the federal court of appeal's decision that the reservation still existed, determined that the state court's jurisdiction extended on to the reservation.[115] It then determined that, in light of the need to conserve the fishery, the Puyallups were entitled to the opportunity to catch 45% of the *total* natural steelhead run in the Puyallup River, and that they could use nets to catch their alloted share.[116]

The superior court's decision was affirmed by the Washington Supreme Court.[117] That court found that the need for state regula-

[114] The reason for the 50% determination was that the court viewed the Indians and other citizens as cotenants. Cotenants, however, are liable for waste, and the court found that the state could, if necessary, regulate the off-reservation fishing of the Indians for conservation purposes. The court stated that Indians and non-Indians share responsibility for the perpetuation of the fish run. The federal court retained jurisdiction over the Indians' fishing. United States v. Washington, 520 F.2d 676, 687 (9th Cir. 1975).

[115] The decision of the State Superior Court is not reported.

[116] Dep't of Game v. Puyallup Tribe, Inc., 86 Wash. 2d 664, 667, 548 P.2d 1058, 1063 (1976). The Department of Game plants trout to increase the size of the run. The court found that the Puyallups were not entitled to a percentage of these fish since the program was funded by fees obtained from the purchase of fishing licenses by non-Indians. The state court found that the Puyallups were entitled to 45% of the entire run while the federal court found that the Indians could fish without state interference on the reservation and, in addition, were entitled to 50% of the run off the reservation. See note 114 and accompanying text, *supra*.

[117] Dep't of Game v. Puyallup Tribe, Inc., 86 Wash. 2d 664, 548 P.2d 1058 (1976).

tions for conservation purposes argued in favor of state jurisdiction over the on-reservation fishing of the Puyallups. This determination was based upon two factors: first, the state was concerned with a matter wholey within its jurisdiction, that is, the determination of the extent to which it could apply its sovereign powers to regulate resources for the purposes of conservation; and second, the United States Supreme Court had specifically remanded this case for a determination of a fair allocation of the fish, which the state court read as giving it jurisdiction on the reservation.[118] The court explicitly refused to defer jurisdiction to the federal courts.

The underlying basis for the court's determination that it had jurisdiction was its contention that its jurisdiction was practical and consistent with the history of the Puyallup litigation:

> In order to control the escapement necessary for the conservation of the species, it is inescapable, given the geography in this case, that the State must be able to control on-reservation fishing activities. State regulation of on-reservation fishing is mandated by, and consistent with, the Supreme Court's view of Indian treaty rights as presented in *Puyallup II*. . . .[119]

The court required the Tribe to submit lists of the names and numbers of tribal fishermen and the amount of fish that each caught. To deny the Puyallup's claim of tribal immunity, the court relied on the Supreme Court's finding that the instant suit was analagous to the prosecution of individual Indians for crimes committed off the reservation.[120] The fact that the fishing was now found to be taking place *on* the reservation did not cause the state court to dispute this analogy.

The Puyallups appealed the state court's finding that the state could regulate on-reservation fishing. In *Puyallup III*,[121] the United States Supreme Court again explicitly refused to determine whether or not the reservation still existed, despite the continued vitality of the issue.[122] The Court summarily addressed the issue of jurisdiction

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[118] *Id.* at 669, 548 P.2d at 1063.

[119] *Id.*

[120] See text at notes 92-94, *supra.*

[121] Puyallup Tribe, Inc. v. Dep't of Game, ___ U.S. ___, 97 S.Ct. 2616 (1977).

[122] The Court in *Puyallup III* stated:

> The continued existence of the Puyallup reservation has been a matter of dispute on which we express no opinion. The Ninth Circuit, relying on our decision in *Mattz v. Arnett*, 412 U.S. 481, held that the reservation did still exist, *United States v. Washington*, 496 F.2d 620 (1974), *cert. denied*, 419 U.S. 1032. That decision predates our consideration of *DeCoteau v. District County Court*, 420 U.S. 425, and *Rosebud Sioux v. Kniep*,

stating that "*Puyallup I* settled an important threshold question in this case—regardless of tribal sovereign immunity, individual defendant-members of the Puyallup Tribe remain amenable to the process of the Washington courts in connection with fishing activities occurring *off* their reservation."[123] Nonetheless, the Court found that the lower court lacked the power to order the Tribe to submit the names of its members or the size of their catch because the Tribe qua Tribe could not be sued in state court absent an effective waiver of its immunity claim. However, the Court also found that a successful assertion of a claim of tribal sovereign immunity did not prevent the state court from adjudicating the rights of individual defendants over whom it had properly obtained jurisdiction.[124] The fact that personal jurisdiction may not have been properly obtained in *Puyallup I* since the fishing, according to the federal court of appeals,[125] occurred within reservation boundaries, was not considered by the Supreme Court in *Puyallup III.*

While refusing to accept as binding the federal court's finding that the Puyallup Reservation still existed, the Supreme Court found that Article III of the Treaty of Medicine Creek, dealing with off-reservation fishing rights, was controlling. The Court did not expressly reiterate its earlier view that Article III was the only grant of fishing rights in the treaty.[126] Instead, it based its decision on the fact that the Puyallups had alienated in fee simple absolute all areas of the reservation abutting on the Puyallup River, and additionally, that regulation was necessary for conservation purposes.[127] The Court also concluded that the state court had used a proper standard of conservation "necessity" in limiting the steelhead catch.

A basic concern of the Supreme Court in *Puyallup III* was the possibility that the on-reservation fishing of the Indians could completely destroy the trout fishery in question.

> If Puyallup treaty fishermen were allowed untrammeled on-reservation fishing rights, they could interdict completely the migratory fish run

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___U.S.___, No. 75-562 (April 4, 1977).

Puyallup Tribe, Inc. v. Dep't of Game, ___U.S.___, 97 S.Ct. 2616, 2621 n.11 (1977).

[123] Puyallup Tribe, Inc. v. Dep't of Game, ___U.S.___, 97 S.Ct. 2616, 2620 (1977) (emphasis added).

[124] *Id.*

[125] United States v. Washington, 496 F.2d 620 (9th Cir. 1974), *cert. denied,* 419 U.S. 1032 (1974).

[126] See text at note 95, *supra.*

[127] Puyallup Tribe, Inc. v. Dep't of Game, ___U.S.___, 97 S.Ct. 2616, 2622 (1977).

> and 'pursue the last living (Puyallup River) steelhead until it enters their nets.' In this manner the treaty fishermen could totally frustrate both the jurisdiction of the Washington Courts and the rights of non-Indian citizens of Washington recognized in the Treaty of Medicine Creek.[128]

The Court added that "[t]he ability of on-reservation activity to completely destroy the resources in question has not been a factor in other cases which have rejected regulation."[129]

In its concern for the conservation of the fishery, the Court ignored several important points. First, the Puyallup fishing was being regulated by the federal district court.[130] Second, even if the state did not have the power to regulate on-reservation fishing, Congress did.[131] If the need for enforcing state regulations for the purpose of conservation was so great, Congress could grant the states the power to do so. Third, the Puyallups offered extensive evidence in their brief that they themselves were beginning a conservation project to prevent the extermination of the fishery.[132]

The Supreme Court's decision in *Puyallup III* leaves many issues unresolved, including whether or not the Puyallup Reservation is still in existence and what the basis is for establishing state jurisdiction over on-reservation Indian affairs. Since the Court did not clearly define the factors involved in its decision, more analysis of *Puyallup III* is necessary before the impact of the decision can be determined.

IV. Interpreting Puyallup III

The Supreme Court's failure to make a determination regarding the reservation status of the Puyallups is the basis for the confusion surrounding the decision. Consequently, this article will focus on three possible interpretations of *Puyallup III*: the first will presuppose that the Court found the reservation had been terminated, the second will assume that the reservation still existed, and finally, the third will hold the Court to its word that the reservation status was unimportant. The plausibility and effect of each of these interpretations will be discussed.

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[128] *Id.* at 2623.

[129] *Id.* at 2623 n.15.

[130] See note 14, *supra.*

[131] See text at notes 33-41, *supra.*

[132] Brief for Petitioners at 12, Puyallup Tribe, Inc. v. Dep't of Game, ___U.S.___, 97 S.Ct. 2616 (1977).

A. No Reservation

Throughout the *Puyallup III* decision, the Supreme Court seemed to imply that were it to consider the question anew, it would find that the Puyallup Reservation no longer existed.[133] In its discussion of the Tribe's assertion that the majority of the Indians' fishing took place within the reservation boundaries, the Court noted that "the continued existence of the Puyallup reservation has been a matter of dispute on which we express no opinion."[134] It went on to add, however, that the court of appeal's finding that the reservation still existed[135] predated the Supreme Court's consideration of two other cases involving the determination of reservation status following the alienation of property. The two cases both resulted in a finding that the reservation in question had been terminated.[136]

If the Court was in fact deciding *Puyallup III* on the assumption that the reservation had been terminated, its decision to find the Article III nonexclusive, off-reservation fishing rights controlling would have been justified. So long as the tribe existed, the treaty would still be valid, and all rights not dependent upon the existence of the reservation would still be enforceable. In addition, if the Court was determining that the Puyallup Reservation had ceased to exist, its holding in *Puyallup III* would merely have continued the recent line of cases,[137] including *Puyallup I,* which had found state regulation of off-reservation fishing to be permissible.[138]

Despite the ease with which the Court could have resolved the conflict in *Puyallup III* if it in fact had found that the Puyallup

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[133] *See, e.g.*, Puyallup Tribe, Inc. v. Dep't of Game, ___U.S.___, 97 S.Ct. 2616, 2621 n.11 (1977).

[134] *Id.*

[135] See text at note 110, *supra.*

[136] In these two cases, Rosebud Sioux v. Kniep, ___U.S.___, 97 S.Ct. 1361 (1977), and DeCoteau v. District County Court, 420 U.S. 425 (1975), the Court found that the purpose of the congressional acts which allowed for the alienation of the reservation lands was to extinguish the reservation. Mattz v. Arnett, 412 U.S. 481 (1973), was distinguished on the grounds that the congressional intent in *Mattz* was not to extinguish the reservation.

[137] *See Indian Treaty Analysis, supra* note 3. The criticism of *Puyallup I* is based on several factors. First, treaties should be read in light of the probable understanding of the Indians at the time the treaties were signed. See text at note 14-15, *supra.* Also, courts have ignored the fact that the fishing rights reserved were between mutual sovereigns. See text at note 16, *supra.* The idea that while treaty rights may not be qualified, the exercise of these rights can, is mere sophistry. See text at note 99, *supra.* However, if *Puyallup III* had been based on the termination of the reservation, then it would not have created new problems for the courts other than those raised by *Puyallup I.*

[138] *See, e.g.*, New York ex rel. Kennedy v. Baker, 241 U.S. 556 (1916); Tulee v. Washington, 315 U.S. 681 (1942); State v. McCoy, 63 Wash.2d 421, 387 P.2d 942 (1963).

Reservation had been terminated, it explicitly refused to make the termination of the reservation its basis for decision.[139] Thus, the refusal to deal with this issue prevents interpreting *Puyallup III* as holding that the reservation was extinguished. Consequently, alternative readings of the decision must be examined.

B. Reservation Still Existed

In light of the federal court's determination that the Puyallup Reservation still existed, and the state court's reliance on this holding,[140] the Supreme Court may have based its decision on the continued existence of the Puyallup Reservation. In fact, despite the continued assertions by the Court that it refused to determine the status of the reservation, it is likely that *Puyallup III* will be read as a grant of power to control on-reservation fishing of Indians in the name of conservation. By refusing to determine reservation status, the Court impliedly found that its determination could be applied to on-reservation affairs. Thus, the discussions based on a finding by the Court that the reservation still existed, and a finding that reservation status was not important, are closely intertwined.

If the Court based its holding on the continued existence of the reservation, a major problem arises when one examines the basis for the state court's jurisdiction over the Puyallup Indians. As discussed previously, states have no inherent jurisdiction on a reservation, and such jurisdiction can be obtained only through a congressional grant.[141] In the instant case, Congress had granted the State of Washington civil and criminal jurisdiction on the reservation, but had expressly excluded jurisdiction over fishing rights guaranteed by treaty.[142]

The Supreme Court in *Puyallup III* determined that the state court could enforce its jurisdiction on a reservation when it had properly obtained jurisdiction off the reservation.[143] Yet, there are problems with obtaining such jurisdiction off the reservation.[144]

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[139] Whether, in light of its history, the reservation has been extinguished is a question this author does not reach.

[140] See text at notes 108 and 115-119, *supra*. Although the state court accepted the federal court's finding regarding the reservation, it still held that it had jurisdiction on the reservation. *Id.* The United States Supreme Court's failure to make a determination regarding the Puyallup Reservation implied an affirmance of the state court's decision.

[141] See text at notes 42-65, *supra*.

[142] See notes 57-59 and accompanying text, *supra*.

[143] See text at note 124, *supra*.

[144] State regulation of off-reservation fishing is criticized because such fishing rights were

More importantly, an immediate transfer of such jurisdiction onto the reservation disregards the well established principles of tribal sovereignty, the distinct and separate nature of reservations and the explicit and implied treaty rights. Finally, the individuals over whom the state courts had obtained personal jurisdiction in *Puyallup I* were no longer parties to the suit in *Puyallup III,*[145] and the Department of Game's regulations extended to all Puyallup fishermen, not only those involved in the original litigation.

If *Puyallup III* is interpreted as a case either where it was determined that a reservation existed, or that reservation status was unimportant, the decision regarding jurisdiction could have wide-ranging ramifications. Since it has been established that a state may regulate the off-reservation fishing of the Indians, any Indian who participates in their treaty-guaranteed right of fishing off the reservation may now subject himself and all members of the tribe to on-reservation fishing regulation. The one limitation implied by the *Puyallup III* decision is that such state regulations must be necessary for the purposes of conservation. However, no working definition of "necessary" has yet been given by the Court.[146]

If the Court based its decision in *Puyallup III* on the fact that the Puyallup Reservation still existed, it should have referred to Article II of the Treaty of Medicine Creek, which defined the Puyallups' rights on the reservation.[147] As discussed previously, fishing rights are impliedly included in the exclusive rights secured to the Indians

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guaranteed by treaty, and, at the time the treaties were signed, the Indians did not know that they would be subject to state regulation. See note 137, *supra.*

[145] Just who the actual parties in the Puyallup suits were is a matter of much confusion. On a few occasions, tribal members appeared in their individual capacity before the Pierce County Superior Court. This was also the practice in certain appearances before the Washington Supreme Court. However, no such personal appearance of an individual defendant was ever filed in the United States Supreme Court. The major responsibility for the litigation was assumed by the tribe itself. In *Puyallup III,* the Supreme Court treated the tribe as the only petitioner. It did not, however, find any difficulty with extending state jurisdiction onto the reservation with regard to individuals over whom the state had not obtained off-reservation jurisdiction. *See Puyallup Tribe, Inc. v. Dep't of Game,* ___U.S.___, 97 S.Ct. 2616, 2619 n.7 (1977).

[146] See *A Supreme Court Error, supra* note 54, for alternative enforcement procedures. The Court itself noted that there will be enforcement problems with its decision:

> [A]lthough [the Tribe] properly resists the authority of the state court to order it to provide information with respect to the status of enrolled members of the Tribe and the size of their catch, it may find that its members' interests are best served by voluntarily providing such information to respondent and to the court in order to minimize the risk of an erroneous enforcement effort.

Puyallup Tribe, Inc. v. Dep't of Game, ___U.S.___, 97 S.Ct. 2616, 2624 (1977).

[147] See text at note 30, *supra.*

on the reservation.[148]

The Court responded to the Puyallups' claim that Article II was controlling by announcing that "such an interpretation clashes with the subsequent history of the reservation and the facts of this case."[149] The Court then noted that it had already been determined in *Puyallup I* that the only fishing rights in question were those "in common with the citizens of the Territory."[150]

The facts of the case which the Court found to be decisive in rejecting the Article II arguments were: (1) that the Puyallups had alienated in fee simple absolute all but 22 acres of their reservation, with none of the remaining land abutting on the river, (2) that neither the Tribe nor its members continued to hold the Puyallup River fishing grounds for their "exclusive use,"[151] (3) that the State had gained control over all civil and criminal actions of the Puyallups on the reservation pursuant to Public Law 280,[152] and (4) that the on-reservation fishing activities of the Puyallups could destroy the fishery.[153]

These factors should have been irrelevant if the Court implicitly found the reservation still in existence. The Court in *Puyallup III* ignored the fact that treaties are the supreme law of the land.[154] Despite the existence of numerous persuasive reasons for implementing conservation laws, the rights guaranteed by treaties cannot simply be ignored. In citing the fact that the Puyallups have alienated their land, the Court chose to deal with the case as a mere question of property law. Yet the issue here is not a matter of property law, it is a matter of Indian law, with a federal treaty controlling. The issue of whether the Puyallups alienated a substantial amount of their land should not be important, except possibly to the issue of reservation status. However, once one assumes that the reservation still exists, the question of alienation is irrelevant.[155] As

[148] See text at notes 23-26, *supra*.

[149] Puyallup Tribe, Inc. v. Dep't of Game, ___U.S.___, 97 S.Ct. 2616, 2622 (1977).

[150] *Id.* at 2622. The Court, by using this argument, ignores the fact that *Puyallup I* was involved with off-reservation fishing, while *Puyallup III* was concerned with on-reservation fishing, and different sections of the treaty should apply.

[151] The Court cited as proof of this statement the fact that non-Indians fish on the same waters as Indians. *Id.* at 2622.

[152] *Id.* at 2622.

[153] *Id.*

[154] The Court reinterpreted the Treaty of Medicine Creek to find that only Article III fishing rights were in question. If the reservation still existed, Article II should control regardless of how much land the Puyallups alienated. See text at notes 66-72, *supra*.

[155] *Id.*

the dissent noted in *Puyallup III*, "[u]nlike either *Puyallup I* or *Puyallup II*, the case before us must be determined under Art. II, which in plainest English provides for 'exclusive' fishing rights for the Puyallups."[156]

The Court's reliance on Public Law 280 is also misplaced in the instant case. Public Law 280 specifically excludes hunting and fishing treaty rights from state jurisdiction.[157] The Court indicated that since the state had jurisdiction over all other areas on the reservation, there was no reason to exclude hunting and fishing rights. If this was the Court's argument, it was in contravention of a federal statute.[158] Congress is invested with the power to promulgate treaties and is the only body which can pass contrary legislation.[159] It has chosen not to do so in the case of hunting and fishing rights.

Finally, the Court seemed to rely most heavily on its view of the conservation crisis involved. As discussed previously, not only was this concern based on speculation, but it ignored the explicit terms of the Treaty of Medicine Creek.[160]

In the case of *State v. Arthur*,[161] a case mentioned but rejected in *Puyallup III* since the Court found that the possibility of extinguishing a fishery had not been considered, the Idaho court stated:

> We are not here concerned with the widsom of the provisions of the treaty under present conditions nor with the advisability of imposing upon the Indians certain regulatory obligations in the interest of conserving wild life; that is for the Federal Government, the affected tribe, and perhaps the State of Idaho to resolve under appropriate negotiations; our concern here is only with reference to protecting the rights of the Indians which they reserved under the Treaty of 1855 to hunt upon open and unclaimed land without limitation, restriction or burden.[162]

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[156] Puyallup Tribe, Inc. v. Dep't of Game, ___U.S.___, 97 S.Ct. 2616, 2625 (1977) (Brennan, J., dissenting). In alluding to the fact that the Puyallups no longer fished exclusively on the river, the Court seemed to be implying that the Puyallups had voluntarily given up their treaty fishing rights. This argument, however, ignores the fact that:

> [t]he Puyallups do not now hold their fishing grounds for their exclusive use precisely because the State has relentlessly sought for many years to prevent their doing so. Indeed, this very suit was begun 13 years ago in an effort to prevent the Puyallups from exercising what they claimed to be their treaty rights on their old reservation.

Id. at 2627.

[157] See text at notes 57-59, *supra*.

[158] *Id.*

[159] See text at notes 9-11, *supra*.

[160] See text at notes 130-132, 156, *supra*.

[161] 74 Idaho 251, 261 P.2d 135 (1953).

[162] *Id.* at 265, 261 P.2d at 143.

If the Court had utilized an analysis similar to the *Arthur* court, the *Puyallup* holding would not be inconsistent with federal law.[163]

C. *Reservation Status Unimportant*

Similar problems to those which occur in an interpretation of *Puyallup III* as holding that the reservation still existed reappear when one argues that the reservation status was unimportant. Again, questions of jurisdictional powers of the state and treaty interpretation remain unanswered. However, if the Court was holding that reservation status was unimportant, the results are more negative. First, such a holding ignores the traditional dichotomy of treatment of Indian actions on and off the reservations.[164] Second, it reinforces the contention that treaties are valueless by reaffirming a disinterest in reservation status. By claiming that conserving a fishery was more important than enforcing federally guaranteed rights, the Court took a great step towards destroying another endangered species, Indian rights.

V. CONCLUSION

The conflict faced by the Supreme Court in deciding *Puyallup III* was clear: the State of Washington wanted to enforce its fishing regulations while the Puyallups claimed immunity from such regulation due to a treaty made with the United States government over 100 years earlier. The Court was faced with two sympathetic issues, Indian rights and conservation. Unfortunately, the Court failed to recognize that alternative conservation methods could be utilized,[165] while the derogation of Indian rights could not be easily remedied.[166] The Court also ignored well established principles of Indian law which have developed over the years.

Puyallup III poses a serious threat to the continued validity of treaties made with the Indians. Nowhere in the treaties does it say that problems of conservation will permit states to regulate on-reservation fishing, yet this appears to be the holding of the case. While it is unrealistic to think that conservation would have been considered 100 years ago, the wisdom of Congress in making the

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[163] See text at note 59, *supra*.

[164] See text at notes 50-52, *supra*.

[165] See text at notes 126-132, *supra*.

[166] Congress can, of course, pass legislation returning such rights to the Indians. However, due to the political weakness of the Indians as a whole, this does not seem likely and would take years to accomplish. *See Aboriginal Rights*, *supra* note 6, at 503-04.

treaty or the affects of the treaty today are not properly before the Court. The Court must simply see that the treaty rights are enforced. Congress can enact legislation in contravention of the terms of an Indian treaty if it so chooses. In its decision, the *Puyallup III* Court implied that there are issues of national importance to which federally guaranteed Indian rights will have to yield. Since the exclusive rights of Indians on their reservations have traditionally been excluded from state jurisdiction not only because of federal preemption but also because of tribal sovereignty, this sovereignty is in danger by the inclusion of on-reservation rights among those which may be forced to give way.[167]

Both the majority and the dissent in *Puyallup III* stated that the holding should be limited to the facts of the case.[168] The Court also stressed the importance of the fact that, in its view, the unrestricted fishing of the Puyallups could destroy the fishery.[169] Perhaps this case should serve as a warning to other Indian tribes that they should rapidly become involved in conservation programs of their own. *Puyallup III* suggests that if conservation is not an issue, then on-reservation regulation will not be allowed absent congressional approval. However, steps should be taken to prevent the Court from establishing a new doctrine of on-reservation control, and the creation of Indian-sponsored conservation programs may be such a step.

If *Puyallup III* is in reality limited to its facts, then Indian tribes whose reservation status is well defined may not be affected by the Court's decision. However, the ease with which the Court transferred off-reservation jurisdiction onto the reservation should not be ignored. The Court may cite *Puyallup III* as justification for extending state jurisdiction over Indian affairs in the future,[170] and despite the existence of many unanswered questions, a new doctrine of total on-reservation state control may be born.

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[167] See notes 32, 47 and accompanying text, *supra*.

[168] The majority of the Court noted several times that it was rejecting the Puyallups' arguments "with particular reference to the facts of this case." Puyallup Tribe, Inc. v. Dep't of Game, ___U.S.___, 197 S.Ct. 2616, 2622 (1977). Justice Brennan, in his dissenting opinion, noted that the decision was limited to its facts. *Id.* at 2627.

[169] See text at notes 128-129, *supra*.

[170] The basis for the argument that conservation allows states to regulate off-reservation fishing is found in the dicta of early Supreme Court cases. *E.g.*, Ward v. Race House, 163 U.S. 504 (1896); United States v. Winans, 198 U.S. 371 (1905). There is nothing in the treaties themselves which allows for conservation issues to take precedence over treaty rights. *Puyallup III*, despite its ambiguities, may be cited as authorizing on-reservation state control.